

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

ORIGINAL

77-6075

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, and THE
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

On Appeal from a Decision of The United States District Court
For the Southern District of New York

**BRIEF FOR THE ASSOCIATION OF AMERICAN MEDICAL
COLLEGES, AND THE AMERICAN HOSPITAL ASSOCIATION,
AMICI CURIAE**

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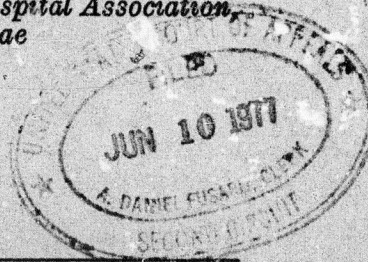




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ISSUE PRESENTED

Whether the United States District Court for the Southern District of New York (Stewart, J.) "erred in concluding that the National Labor Relations Act, 29 U.S.C. §§151 et seq., (Act) did not preempt the New York State Labor Relations Board (NYSLRB) from exercising state jurisdiction over the relationship between interns, residents and clinical fellows (Housestaff) and voluntary not-for-profit hospitals.

INTEREST OF THE AMICI CURIAE

The Interest of the Association of American Medical Colleges

The Association of American Medical Colleges (AAMC) is a nonprofit voluntary association founded in 1876 for the purpose of advancing medical education and the nation's health. AAMC seeks to strengthen and cooperate with all programs that are important to the nation's health, with particular concern for the continuum of undergraduate and post-graduate education for the independent practice of medicine. AAMC's membership is comprised of all the nation's 115 schools of medicine, 58 academic societies and over 400 teaching hospitals affiliated with medical schools.

AAMC has participated throughout the administrative and judicial development of the issue subjudice. AAMC initially participated as an amicus curiae before the National Labor Relations Board (NLRB) in the five decisions which first held that "interns, residents and clinic fellows were primarily students" and not employees under the Act. 1/ These initial NLRB decisions formed the basis for subsequent federal court proceedings, which are

1/ St. Christopher's Hospital for Children, 223 NLRB 166, 91 LRRM 1417 (1976)
Cedars-Sinai Medical Center, 223 NLRB 251, 91 LRRM 1398 (1976)
Wayne State University Affiliated Hospitals, 226 NLRB No. 168, 93 LRRM 1424 (1976)
St. Clare's Hospital and Health Center, 223 NLRB 1002, 92 LRRM 1001 (1976)
University of Chicago Hospitals and Clinics, 223 NLRB 1032, 92 LRRM 1039 (1976)

the subject of the appeal herein, and in which AAMC also participated amicus curiae. 2/ AAMC has a significant continuing concern in the outcome of this proceeding.

The Interest of the American Hospital Association

The American Hospital Association (AHA) is comprised of more than 7,000 member institutions which make up the health care system of the United States. This system and the institutions which form it are engaged in medical education, research and the delivery of health care. The education, training, and development of housestaff is a matter of intimate concern to the AHA's member institutions. The consideration of the issues presented in the instant case is therefore of primary interest to all of AHA's member institutions as well as the teaching hospital component of that membership. It is earnestly submitted by AHA that its participation in support of the NLRB is both appropriate and helpful to a thorough consideration of the issues.

The Joint Interest of Amici Curiae

Both AAMC and AHA are involved in graduate medical education through their membership in the Coordinating Council on Medical Education (CCME). The CCME reviews all matters of policy relating to undergraduate and graduate medical

2/ N.L.R.B. v. Committee of Interns and Residents, 426 F.Supp. 438, 94 LRRM 2739 (S.D.N.Y. 1977).

education and coordinates the activities of the Liaison Committee on Medical Education (LCME) and the Liaison Committee on Graduate Medical Education (LCGME). The LCME is responsible for accreditation of undergraduate medical education leading to the award of the doctor of medicine degree. The LCGME was formed in 1973 to set standards for and approve programs of graduate medical education leading toward specialty certification.

The instant appeal seeks to overturn a decision of the United States District Court for the Southern District of New York (Stewart, J.) reported at 426 F. Supp. 438 (1977). Judge Stewart held that the National Labor Relations Act as amended, 29 U.S.C. §§151 et seq., had not preempted state jurisdiction over the relationship between housestaff and voluntary not-for-profit health care institutions. The 1974 Health Care Amendments to the Act extended coverage to these health care institutions. Many of these institutions offer programs in graduate medical education. The outcome of the instant appeal is therefore of vital interest and concern to both AAMC and AHA as it will significantly impact upon graduate medical education and health care delivery.

Both AAMC and AHA adopt the formal statement of facts and legal arguments submitted by the National Labor

Relations Board and those further arguments presented by amici curiae Albert Einstein College of Medicine, Beth Israel Medical Center, Brookdale Hospital Medical Center, Greater New York Hospital Association, Hospital Association of New York State, Long Island Jewish-Hillside Medical Center, and Misericordia Hospital Medical Center. In fulfilling their respective members' responsibility to maintain the standards of graduate medical education and sound health care delivery, AAMC and AHA seek herein to emphasize the detrimental effects of the decision below on that mission.

ARGUMENT ON BEHALF OF THE ASSOCIATION
OF AMERICAN MEDICAL COLLEGES AND THE
AMERICAN HOSPITAL ASSOCIATION

I. The Preemption Ruling of the Court
 Below Is Based on an Invented and
 Improper Test of Federal Jurisdiction

The issue in this case is whether federal jurisdiction has preempted state jurisdiction over the relationship between voluntary not-for-profit health care institutions and housestaff. In considering the preemption issue, the Court below invents, without legal precedent, a novel and improper test for federal jurisdiction. The Court's analysis proposes, for the first time, the following two-pronged test:

It is properly within the power and duties
of the Board, as the agency entrusted with

the primary responsibility of administering and interpreting the Act, to make this initial determination as to the "employee" status of housestaff. Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 67 S. Ct. 789, 91 L.Ed. 1040 (1947); Bethlehem Steel, supra. Indeed, this determination, and a finding that the employer is engaged in activity affecting interstate commerce, are threshold jurisdictional questions which the Board must always resolve before it may entertain any labor dispute presented to it.

426 F. Supp. at 448-49, (emphasis supplied). Simply stated the Court's test requires: jurisdiction over the employer and jurisdiction over the employee. However, there is no basis for the assertion that the status of an employee is a jurisdictional question. By its misdirected jurisdictional focus on the "employee", the Court attempts to explain away what it must admit - that by the 1974 health care amendments, Congress intended to preempt state regulation of the labor relations in general of voluntary not-for-profit health care institutions. That is, the Court misstates Congressional intent so as to require its desired result:

"...Congress intended...to preempt from state regulation the labor relations of employees of private, voluntary, non-profit hospital employers...." Id., (emphasis supplied).

Contrary to this statement of the Court below, Congress intended preemption throughout the health care system administered by voluntary not-for-profit health care institutions. However, by erroneously focusing Congressional

intent on the "employee" the Court is able to jump to its conclusion that if the individuals at issue are not "employees" under the Act, then there is no preemption.

Crucial to Judge Stewart's preemption analysis is his attempt to distinguish the Supreme Court ruling in Bethlehem Steel Company v. New York State Labor Relations Board, 330 U.S. 767 (1947). Judge Stewart found that the rationale of Bethlehem Steel could not be applied to this case because:

...one of the elements vital to Bethlehem Steel is missing. Bethlehem Steel was premised on the fact that the Board had jurisdiction over the foremen's petition. As the Court stated:

The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. 330 U.S. at 776.

426 F. Supp. at 449-50. Judge Stewart then concludes that the "clear import" of this passage is that without a finding that the foremen in that case were "employees" there would have been no jurisdiction. This proposition is nowhere supported in the opinion, indeed, it is contrary even to the quoted passage itself:

The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. Id., (emphasis supplied).

In Bethlehem Steel the state agency argued that "until the federal power is actually exercised as to the particular employees, state power may be exercised." 330 U.S. at 771, (emphasis supplied). This argument did not prevail in Bethlehem Steel. The Supreme Court focused its jurisdictional analysis on the industry and on the employer. The ruling of Judge Stewart thus adopted what was rejected in Bethlehem Steel.

The dictates of Bethlehem Steel are thus quite clear; in considering preemption of state labor law by federal labor law the focus must be on the employer. If the employer is under the jurisdiction of the federal statute (i.e. if the NLRB would exercise its jurisdiction over the employer), then federal law "preempts" and state law does not apply.

In La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949), the Supreme Court reviewed the "wisdom of the policy underlying the Bethlehem case and adhere[d] to it." The Court noted:

We went on to point out that the National Board has jurisdiction of the industry in which those particular employers were engaged and had asserted control of their labor

relations in general ... Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us ... Those considerations control the present cases ... Id. at 25 (emphasis supplied).

Likewise, "those considerations" control the case at bar.

It is evident here, and agreed, that Congress has vested jurisdiction over the labor relations of voluntary not-for-profit hospitals exclusively in the NLRB. 3/ Additionally, this jurisdiction has been exercised by the NLRB over voluntary not-for-profit hospitals 4/ and by advisory opinion the NLRB has stated that it would exercise jurisdiction over health care institutions directly involved in this proceeding. 5/

As demonstrated above, Judge Stewart has developed an unprecedented jurisdictional test which is plainly contrary to the relevant preemption holdings of the Supreme Court. His opinion is improperly focused on the status of housestaff rather than upon whether there is federal jurisdiction over the employers. Thus, the Court below erred in allowing state law to apply.

3/ See 29 U.S.C. §152(2) and (14).

4/ See e.g. East Oakland Community Health Alliance, 218 NLRB 1270, 89 LRRM 1372 (1975).

5/ See e.g. Misericordia Hospital Medical Center 224 NLRB No. 126, 92 LRRM 1363 (1976), and Albert Einstein College of Medicine, 226 NLRB No. 185, 93 LRRM 1433 (1976).

II. The Decision Below Which Allows State
Jurisdiction Over Housestaff Is Contrary
to "National Labor Policy" and Would
Adversely Effect Graduate Medical
Education and Health Care Delivery.

- A. State regulation of housestaff is improper because the relationship between housestaff and teaching hospitals is educational not economic.

The Court below ruled there is no "national labor policy" under the Act which preempts the exercise of state jurisdiction over housestaff. The Court concluded:

The impact which collective bargaining might have on the "student-teacher relationship" and the educational experience, which amicus Association of American Medical Colleges urges in support of the Board's ruling on preemption ... may be a legitimate concern of education policymakers, but this is surely beyond the scope of any national labor policy.

426 F. Supp. at 453. The Board, exercising its expertise and responsibility in matters of "national labor policy", reached a contrary conclusion:

[The Board] has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

Kansas City General Hospital, 225 NLRB No. 14A, 93 LRRM 1362, 1364 (1976), (emphasis supplied). The decision below is contrary to "national labor policy" in that it allows state regulation of the labor relations of housestaff and

teaching hospitals thereby improperly imposing an economic model (i.e. collective bargaining) upon a relationship that is not economic in nature. The relationship between housestaff and teaching hospitals as demonstrated below, is that of student-teacher, and is therefore educational.

Medical school graduates do not participate in the programs of teaching hospitals to earn a living; they enroll in such programs to complete their education and to receive specialized training. Indeed, graduate medical education is now a legal requirement in that virtually all states require physicians to complete at least one year of graduate training before they are eligible to be licensed. Moreover, it is universally recognized that an individual cannot competently practice medicine unless he has acquired the training offered by graduate medical programs.

While it is undisputed that properly supervised patient care by housestaff is of benefit to patients of the hospital and thus to the hospital, there is a critical distinction between the patient care service rendered by graduate medical students and that of "employees." Housestaff, unlike hospital employees, are engaged in patient care as a necessary and integral part of their educational development. The practice of medicine requires the acquisition of much

medical knowledge, art, and skill which can only be acquired empirically rather than didactically -- by doing rather than by watching.

Recently the NLRB substantiated the fact that the relationship between housestaff and health care institutions is educational and not economic. In St. Clare's Hospital and Health Center, 229 NLRB No. 158 (1977), the NLRB, while denying the Committee of Interns and Residents' motion for reconsideration and rehearing (defendant-appellee herein), emphasized the educational nature of the relationship between housestaff and teaching hospitals and medical schools noting that "...the individuals are rendering services which are directly related to --- and indeed constitute an integral part of --- their educational program, they are serving primarily as students and not primarily as employees."

Id., slip op. pp. 7-8 (footnote omitted) (emphasis supplied).

The NLRB recognized the importance of distinguishing between a student-teacher relationship, based on a mutual interest in the advancement of a student's education, which is academic in nature, and an employee-employer relationship, based on conflicting interests of the employer to minimize costs and the employees to maximize wages, which is economic in nature. Id., slip op. p. 9. After drawing this important distinction the NLRB noted that collective bargaining is itself fundamentally an economic process and stated:

From the standpoint of national labor policy, subjecting academic decisionmaking to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours and terms and conditions of employment. From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decisionmaking. The inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgement, prove detrimental to both labor and educational policies.

Id. (emphasis supplied). In conclusion, the Board has recognized the educational relationship between teaching hospitals and housestaff and that to extend collective bargaining rights to housestaff would be contrary to "national labor policy." 6/ Thus, Judge Stewart's conclusion that concern for the detrimental impact of collective bargaining upon the "student-teacher relationship" and the "educational experience" is "beyond the scope" of national labor policy is in error.

- B. An allowance for collective bargaining by housestaff is inappropriate and would have a detrimental effect upon graduate medical education.

A most important effect of the decision below would be the lasting negative impact that collective

6/ See Kansas City General Hospital, 225 NLRB No. 14A, 93 LRRM 1362 (1976) and St. Clare's Hospital and Health Center, 229 NLRB No. 158 (1977).

bargaining would have on the form, content and function of graduate medical education in the United States. For example, a hallmark of collective bargaining is the goal of eliminating "inequality of bargaining power between 'employer' and 'employees.'". See, e.g. N.Y. Labor Relations Act §700 (McKinney) and 29 U.S.C. §151. However, the notion of "equality of bargaining power" is altogether contrary to the nature of the student-teacher relationship. The relationship is necessarily unequal; a teacher, having superior knowledge and experience, is the better judge of the course of the student's instruction. Highly trained professionals, who have themselves completed graduate medical education, must determine the content and duration of these programs if the requisite educational experience is to be achieved. Comparative bargaining power is appropriate to the employer-employee relationship which has inherently conflicting interests -- the employer to keep costs down and the employee to keep wages up. Bargaining power is altogether inappropriate in the context of graduate medical education, where teachers and students have a mutual goal of preparing the student for the independent practice of medicine.

In addition, the process of graduate medical education is not suited to the collective treatment of housestaff individuals. Students come to hospital training

programs with varied abilities and educational background, consequently their assignments, hours, supervision, and rotations must be formulated on an individual and continuing basis, so that at the end of the training, the housestaff members will have the knowledge and skills necessary for their particular specialities. This differentiation among students makes the collective treatment of all housestaff at a particular institution an impossibility.

The vital interest of all hospitals (whether or not they have housestaff) in maintaining national standards for the training of physicians would be undermined by exposure to multi-jurisdiction collective bargaining. At present, the CCME and the LCGME provide national standards which specify such requirements as the nature of the teaching staff, hospital facilities, student selection procedures and methods of instruction. If subject to the variations and uncertainties of jurisdiction at the states' level, these present standards, which are necessarily uniform, would become unacceptably fragmented. Thus, in some states the requirements of the LCGME standards themselves might be the subject of negotiations. In others, the impact of collective bargaining on the national standards might be less direct. In both cases, however, there would be an adverse impact on the ability of health care institutions to conform to national standards so essential to producing physicians of high competence throughout all sections of the country.

Application of an industrial relations model to graduate medical education would seriously hinder the educational process, since many fundamental aspects of medical training would be bargainable subjects. For example, the very nature of the supervision and instruction of housestaff by attending staff might be subject to negotiations in some states. Negotiations might also include on-call scheduling or the allocation of technical tasks between interns and, for example, laboratory personnel.

In the industrial context, "hours" is a mandatory subject of bargaining. It is a fact that housestaff spend long hours at their hospitals either in patient care or on call. Long hours have traditionally been considered necessary if the student is to be exposed to the wide range of experiences necessary for a complete graduate education. Ideally, in order to have the intended benefit of clinical experience, a student should diagnose and treat a patient from the patient's admission to the hospital until his discharge. However, because long hours are generally unpopular with housestaff and because hours would be a bargainable subject, there would develop intolerable conflict between the educational goals of the faculty and the desires of the students.

Other areas of training, traditionally basic aspects of graduate medical education, would likely be mandatory subjects of bargaining, including the selection process, termination policy, rotation of residents among clinics, emergency and out-patient services, testing, and even the length and content of the training program itself.

The most serious and damaging impact on graduate medical education would result from the submission of issues relating to education to the process of arbitration. Not only would a hospital be required to bargain over educational matters; it would likely have to submit educational matters for decision by a third party. As a result, third parties, versed in labor relations and not medicine, would become the final arbiters of many key issues associated with graduate medical education.

CONCLUSION^o

The District Court's decision is based on a fundamental misunderstanding of preemption and "national labor policy." The Association of American Medical Colleges and the American Hospital Association submit that this decision will result in a damaging impact upon graduate medical education and health care delivery in the United States.

For the reasons set forth herein, the District Court order denying the motion of the National Labor Relations Board for a preliminary injunction and granting the motion for summary judgement of the Committee of Interns and Residents is in error and must be reversed.

Respectfully submitted,

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National Labor Relations Board

Plaintiff-Appellant

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Labor Relations Board

Defendants-Appellants

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Carl Wm. Vogt.

being duly sworn,

deposes and says that he is over the age of 21 years and resides at
11 Park Place New York, New York

That on the 6th. day of June 1977

at

he served the annexed Brief

upon

Murray A. Gordon Esq.
666 Third Avenue
New York, New York

in this action, by delivering to and leaving with said attorneys

3 true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 6th.

day of June 1977


ROLAND W. JOHNSON

Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1977